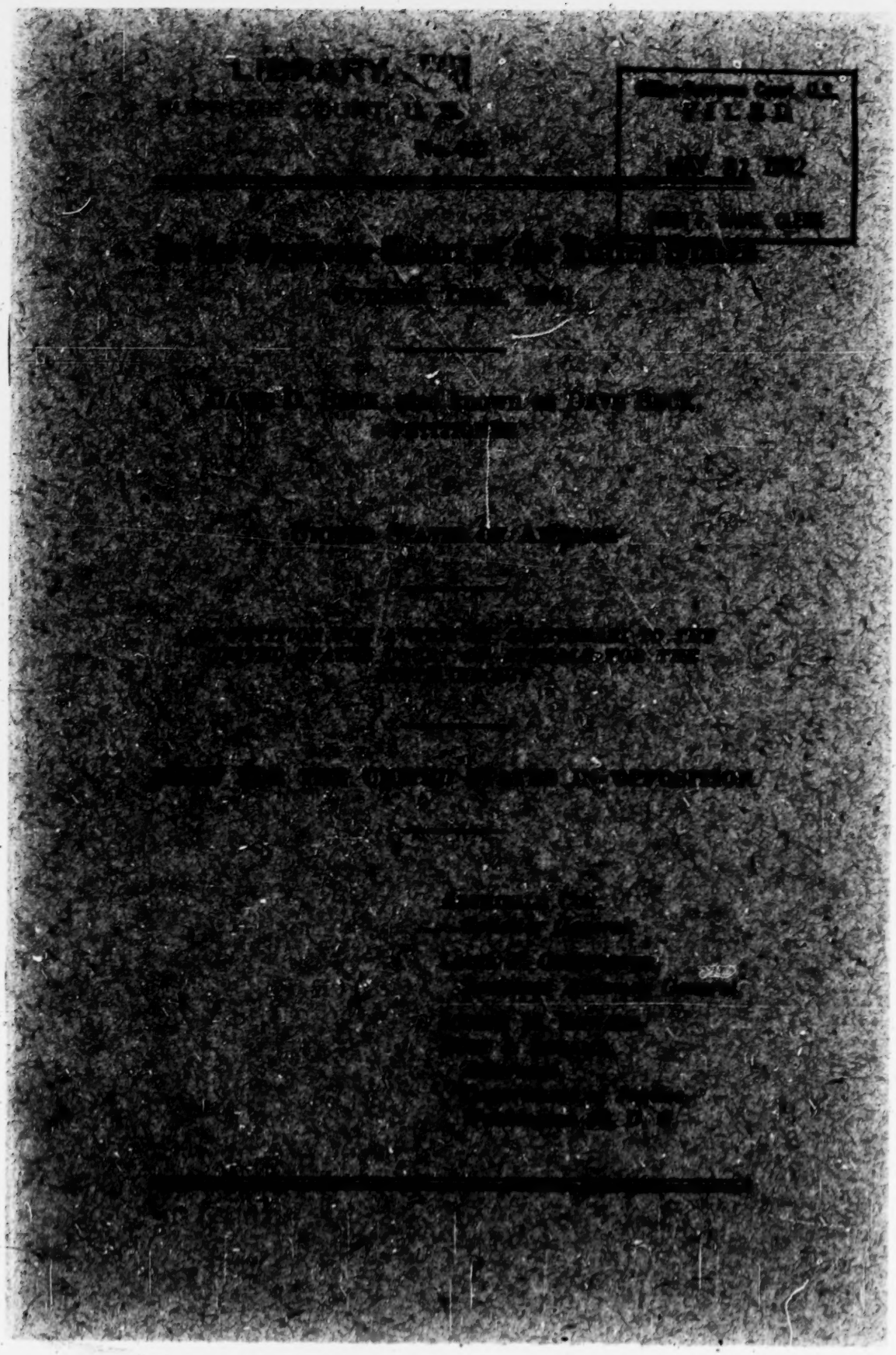

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 927

DAVID D. BECK, also known as DAVE BECK,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. "B") is reported at 298 F. 2d 622.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1962 (C.T. 4),[1] and the petition for

[1] "C.T." references in this brief are to the clerk's transcript of the proceedings in the court of appeals. References preceded by "R." are to the printed record in two volumes;

rehearing was denied on March 7, 1962 (C.T. 5). The time for filing a petition for a writ of certiorari was extended to May 4 by orders of Mr. Justice Douglas, and the petition was filed on May 2, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED:

1. Whether the trial court erred in denying petitioner's motion to dismiss the indictments on the ground that the proceedings of the grand jury were conducted in an atmosphere of community prejudice against him.

2. Whether the trial court abused its discretion in denying petitioner's motions for change of venue and for a further continuance of the trial date, also predicated on the claim that the climate of public opinion was prejudicial to him.

3. Whether the evidence is sufficient to support the verdict of guilty on two counts relating to the filing of false information returns (the so-called "990 counts").

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States:

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present-

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those preceded by "Tr." are to the typewritten transcript of proceedings at the trial, consisting of 113 volumes, designated Vols. 1A through 60A, covering 10,997 pages.

ment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Internal Revenue Code of 1939:

SEC. 3793. PENALTIES AND FORFEITURES.

* * * * *

(b) *Fraudulent Returns, Affidavits, and Claims.*—

(1) *Assistance in preparation or presentation.*—Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit,

claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

• • • •

(26 U.S.C. 1952 ed., Sec. 3793.)

Federal Rules of Criminal Procedure:

RULE 6. *The Grand Jury*

• • • •

(b) *Objections to Grand Jury and to Grand Jurors.*

(1) *Challenges.*—The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) *Motion To Dismiss.*—A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to sub-

division (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

* * * *

RULE 21. *Transfer From the District or Division for Trial*

(a) *For Prejudice in the District or Division.* The court upon motion of the defendant shall transfer the proceedings as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

* * * *

STATEMENT

Two indictments were returned against petitioner in the United States District Court for the Western District of Washington, Southern Division, the first in two counts on May 2, 1957, and the second in seven counts on August 28, 1957. Four counts (hereinafter referred to as the evasion counts) charged petitioner with wilful attempts to evade or defeat his personal income taxes for each of the years 1950 through 1953, in violation of Section 145(b) of the 1939 Code, and three (hereinafter referred to as the 990 counts) charged him with wilfully and knowingly aiding and assisting in, and counseling and procuring, the preparation and filing of false and fraudulent annual information returns (Forms 990) for the Joint Council #28 Building Association, a tax-exempt

union entity, for each of the years 1950 through 1952, in violation of Section 3793(b)(1) of the 1939 Code. The remaining two counts charged petitioner and others with conspiracy to evade and defeat the payment of petitioner's income taxes in violation of 18 U.S.C., Section 371. (R. 3-5, 435-453.)

The indictments were consolidated for trial (R. 46) but a severance was granted as to the conspiracy counts (R. 114), and subsequently the 990 count for 1951 was dismissed on the Government's motion (R. 665).

After a jury trial of fourteen weeks—from November 10, 1958 through February 19, 1959—petitioner was found guilty on the six counts tried, *i.e.*, the four evasion counts covering 1950 through 1953, and the two 990 counts covering 1950 and 1952. (R. 424, 455.) On February 27, 1959, petitioner was sentenced to imprisonment for five years and fined $10,000 on each count, plus costs, the prison sentences to run concurrently and the fines to be cumulative. (R. 427-429, 432-434.)

The court of appeals (Pet. App. "B") affirmed petitioner's conviction on the 990 counts, but, upon the suggestion of the government, reversed the conviction on the evasion counts and remanded them for retrial to resolve the issue raised by the intervening decision of this Court in *James* v. *United States*, 366 U.S. 213, *viz.*, whether petitioner had embezzled the funds involved, and hence could not be held to have *wilfully* evaded his taxes during the indictment years, or whether he had obtained the funds (or a part thereof) by means other than em-

bezzlement, in which case wilful tax evasion would be open to proof.

Although the decision of the court of appeals leaves the way open for a retrial of the evasion counts, the government will not seek to retry those offenses in the event that the sentence under the 990 counts becomes final. Several considerations enter into this decision: the imposition of a five-year sentence on the 990 counts; the trial judge's evaluation of the matter of appropriate punishment when he made the jail sentences under the various counts concurrent; the protraction of the earlier trial proceedings; the availability of witnesses in the event of retrial.

1. The pre-trial motions

While the government accepts petitioner's chronology (Pet. App. "A") of the publicity attendant upon his appearances before the Senate Select Committee on Improper Activities in the Labor or Management Field and upon the state proceedings against him for embezzlement, it offers the following summary of the salient facts in order to place the publicity issue in its proper perspective:

Petitioner's appearances before the Select Committee occurred on March 26, 1957 (Pet. App. "A" 3A-14A) and May 15, 1957 (Pet. App. "A" 21A-23A). The first indictment against petitioner was returned on May 2, 1957, two weeks prior to the running of the statute of limitations. It included one of the four evasion counts, and one of the two 990 counts, on which petitioner was ultimately convicted. (R. 3-5.)

The second indictment, which included the remaining evasion counts and the other 990 count, was returned about four months later, on August 28, 1957 (R. 435-453.) In the interim, on July 12, 1957, petitioner was indicted by a state grand jury for embezzling $1,900 from the Western Conference of Teamsters in February 1956. (Pet. App., "A" 26A.) The funds involved in the state embezzlement charge are not involved in the federal indictments.

On October 14, 1957, petitioner moved for dismissal of the federal indictments, for a six months continuance of the trial date which had been set for January 6, 1958 (R. 46, 47), and for a change of venue from the Southern Division of the Western District of Washington (which sits in Tacoma) to the Northern Division (which sits in Seattle and Bellingham) (R. 10-11, 14-15, 17). The affidavits accompanying the motions (R. 15-16, 18-44) alleged in substance that bias and prejudice existed against appellant as a result of the widely publicized investigation of the Select Committee into activities of the International Brotherhood of Teamsters and affiliated organizations of which petitioner was the immediate past president.

On October 28, 1957, after a hearing, the trial court granted the continuance, and took the other motions under advisement (R. 45-47), pending an examination *in camera* of the grand jury proceedings. On November 25, 1957, the court denied the motions to dismiss and for change of venue, noting in the order that it had examined the transcript of the grand jury proceedings, that (R. 115) "nothing appearing

therein" indicated "any irregularity in the proceedings", and that "no other basis" appeared for dismissal of either indictment or any count thereof (R. 114-115).

On January 28, 1958, petitioner moved for a further continuance of six weeks, or in the alternative, for a change of venue, because of the publicity in November and December, 1957 which attended his trial and conviction, and that of his son, on the state embezzlement charge. (R. 116-122.) The court granted the requested continuance on January 31, 1958. (R. 467.)

On April 9, 1958, petitioner renewed his motion to dismiss, and also moved for a further continuance of at least six months, or, in the alternative, for a change of venue. On this occasion, the moving papers (R. 154-168) alleged that petitioner had been prejudiced by the unfavorable publicity attendant upon his sentencing on the state embezzlement charge in February 1958, and upon the release in March 1958 by the Select Committee of two reports of its activities, both of which denounced petitioner's conduct and contained assertions that he had misappropriated union funds. After a hearing, the court granted the motion and continued the trial indefinitely. (R. 223-229.)

On August 8, 1958, petitioner again moved for a change of venue to the Northern Division but this time solely on the ground that it would be more convenient to try the case in Seattle, where petitioner and numerous witnesses resided, than in Tacoma, where the indictments were returned. (R. 232-234.)

On August 11, 1958, in the course of a hearing on this and other motions, defense counsel—after noting that the court would probably reset the case for trial in the near future—stated (R. 310) that he would "object to any trial date prior to the election" because petitioner was a subject of controversy in the election campaigns. At the same time, counsel acknowledged (R. 310) that "I don't think I would be in any position to ask for any longer continuance after [the] election, and I wouldn't do so." The court denied the motion for change of venue (R. 315-316) and set the case for trial on November 10, 1958 (R. 467), a date subsequent to the election, approximately a year and one-half after petitioner's Committee appearances, and almost nine months after petitioner's sentencing on his state embezzlement conviction.

Two subsequent motions for still further continuances, on September 23, 1958 and November 10, 1958, respectively, were similarly denied (R. 244-256, 318-335, 342-344, 351-365, Tr. 276), the trial judge acting on the second (and final) motion only after the impanelment of the jury (R. 474), at which point he made the following observation (Tr. 275):

> My honest judgment is that the jury that was impaneled yesterday, and the experience we had in the impaneling of that jury, confirmed beyond all possible doubt that in this case we have a jury without the slightest vestige of prejudice or bias, and all members unaffected in any manner by publicity or any other improper consideration. If I had the slightest doubt that this trial would not be fairly and impartially conducted or that either the Government or the de-

fendant would not have a fair, proper chance to present the case in a calm, dispassionate atmosphere, I would not hesitate to continue the trial."

2. Proceedings on impanelment of the jury

The proceedings on impanelment of the jury (R. 473-624) show that the trial judge, in conducting the voir dire examination, repeatedly questioned the prospective jurors as to possible bias or prejudice against petitioner from any cause whatsoever, including prior adverse publicity, and that he admonished the jurors finally impaneled not to discuss the case with anyone, or listen to any telecasts or broadcasts, or read any news accounts or articles relating to the case, or form any conclusions about it until they had heard all the evidence and the court's instructions on the law. (R. 476-488, 504-533, 626-631.) The jury was reminded of this admonition at every recess of the trial (see, *e.g.*, Tr. 724-726, 922, 1106-1108, 4692-4696, 5653-5654, 10527-10529) and was emphatically instructed, at the conclusion of the trial (R. 753-754), to avoid all considerations of sympathy, bias or prejudice, if any, and to decide the case solely on the evidence and the law.

Of the original panel, 29 prospective jurors were excused for undue hardship or inconvenience (R. 478-480), and 17 were excused for reasons of possible bias or prejudice for or against petitioner (R. 481-485). Of the remaining group, twelve were challenged for cause. Of these, ten were excused because

they had viewed telecasts of the Committee hearings, and one on the ground that her husband was a member of a Teamsters' local. Only one challenge for cause was denied, that relating to a juror who had read some newspaper accounts of the Committee hearings. (R. 533-534, 544, 553, 568, 574, 588, 605, 612, 621.)

The jurors who were substituted for those challenged were examined by the court on the matters and in the particulars heretofore mentioned. (See, e.g., R. 541-550.) All of the jurors finally selected had repeatedly affirmed, both by response to the court's questioning and on their oaths, that they could try the case solely on the evidence and the law as instructed by the court. (R. 481-488, 519-533, 624.)

3. The 990 counts

The following summary relates to the claim that the jury may have confused the law or the evidence pertinent to the evasion counts with that pertinent to the 990 counts, and also sets forth the proof that petitioner wilfully participated in, and was responsible for, the preparation of the false 990 returns in question:

One of these ten was the prospective juror Hamilton (see Pet. App. "A" 36A-37A) who, disregarding the court's efforts to prevent it, stated that he held an unfavorable opinion of petitioner because petitioner had invoked the Fifth Amendment at the Senate Committee hearings. As a result of this occurrence, and after excusing Hamilton, the court again admonished and examined the remaining jurors. (R. 572-576.)

(a) *Statements of counsel and instructions to the jury*

From the outset of the trial, the distinctions between the four evasion counts and the two 990 counts were repeatedly impressed upon the jury. The prosecutor, at the beginning of his opening statement, observed (R. 635) that the separate counts "fall into two categories of offenses"—the tax evasion counts, on the one hand, and the 990 counts on the other. (R. 635-636.) After separately reviewing the specific allegations contained in each of the six counts (R. 636-638), the prosecutor told the jury (R. 638-640) that it should not be confused by the similar phrasing of the separate counts within each group of offenses; that the government was required to prove each count beyond a reasonable doubt; and that the first category of offenses was distinguishable in certain important particulars from the second. The prosecutor completed his opening statement by outlining the evidence to be presented by the Government, first with respect to the evasion charges (R. 640-642), and secondly with respect to the 990 counts (R. 663-665).

Defense counsel responded by brushing aside "these less important charges" with the brief statement that petitioner was a very busy man who had to rely on others for the preparation and filing of forms, and that there was "no substance" to these "lesser charges." (R. 669-671.) The remainder of defense counsel's remarks were addressed solely to the evasion counts which he characterized (R. 671) as the "main" or "most important charges."

In their closing arguments to the jury, both prosecutor and defense counsel dealt separately with the evidence bearing on the 990 counts. (Tr. 10,651-10,653; 10,677-10,685, 10,762-10,764, 10,772-10,775, 10,797-10,801.)

Against this background the trial judge, in his instructions, repeatedly admonished the jury as to (1) the separate consideration to be accorded each count, (2) the separate elements comprising each count, and (3) the distinctions between the evasion counts and the 990 counts. (R. 703-706, 707-709, 711, 713, 723, 730-736, 748-750, 754.)

Finally, the form of the verdict submitted to the jury, and the instructions pertinent thereto, afforded further assurance that petitioner would not be prejudiced by the consolidation for trial of six separate counts covering two distinct groups of offenses. (R. 751-752.)

(b) *The evidence*

Petitioner served as president of the Joint Council 28 Building Association from 1934 to 1953. As a tax-exempt labor organization, the Association was required to file an annual information return, Form 990, with the District Director of Internal Revenue, setting forth, among other things, the Association's receipts and disbursements for the year. Form 990 returns were filed by the Association for each of the years 1941 through 1950, and for 1952 and 1953, but there was no record in the District Director's

office of a return for 1951. Although the Association's returns were customarily signed by Frank Brewster, its secretary-treasurer, the returns for 1942 and 1945 were signed by petitioner. Petitioner also customarily signed the Form 990 returns filed by the Western Conference Pension Trust Fund, another tax-exempt union entity, of which petitioner was trustee. (Tr. 333-339, 341-345, 4581, 5512-5514, 5559, 5563; Exs. 41 through 55, 55A, 712.)

The Association's 1945 return, which petitioner had signed, was false in that it reflected certain expenditures as part of the cost of property sold by the Association in that year, when in fact such amounts were payments to John Lindsay, a Seattle contractor frequently employed by the union, for work done on behalf of petitioner personally. (Tr. 9840-9846, 9977-9991, 10,171-10,174, Exs. 45, 655a, 716.)

The return for 1950 (Ex. 50) was false in that it reflected an expenditure by the Association of $16,718 for building payments and alterations, of which amount $13,590 was in fact applied by petitioner to his own use and benefit. It was further false in that it reflected an expenditure by the Association of $18,900 for new construction, of which amount $8,000 was for the personal benefit of petitioner. (Tr. 10,165-10,167.)

The return for 1952 (Ex. 51) was false in that it reflected an expenditure by the Association of $54,838 for building payments, alterations and improve-

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The count relating to 1951, as noted above, was dropped. Petitioner was convicted on the two 990 counts relating to 1950 and 1952, respectively.

ments, all of which was in fact applied by petitioner to his personal use and benefit. The 1952 return also reported that the Association had expended $15,084 for building equipment, supplies, services and repairs, of which amount $1,368 was paid to the plumbing firm for work done for petitioner personally. (Tr. 10,167-10,171.)

During the years 1950 through 1953, Lindsay received approximately $124,000 by check from the Association for work done on petitioner's personal behalf. These payments were recorded as expenses of the Association and were shown as such in the Form 990 returns prepared by Donald McDonald, the bookkeeper, for those years. (Tr. 4877, 9846-9850; Exs. 50, 51.)

Laurita T. Agapoff, who served as the Association's bookkeeper and prepared its Form 990 returns for all years prior to 1949, testified that petitioner usually told her what to record on the stubs for Association checks drawn at his request, and that, but for petitioner's instructions, she would not have known the purpose of those checks. The stubs for checks that petitioner ordered drawn upon the Association were missing, and therefore could not be presented to the witness for identification. She was able, however, to identify several stubs for checks drawn upon the Joint Council #28 Legislative Fund. Two of those stubs bore petitioner's handwriting. In 1949, when Agapoff turned the Association's books over to McDonald, her successor, she showed him the manner in which the books had been kept. (Tr. 5496-5499, 5503-5511, 5515, 5523-5527, 5537; Exs. 798, 798A.)

McDonald served as bookkeeper for the Building Association and Western Conference from 1949 through 1953. He testified (Tr. 4458) that checks issued to Lindsay were always written upon instructions received directly or indirectly from petitioner, and were never written on anyone else's instructions. McDonald received these instructions either orally from petitioner in his office or by notes which petitioner sent to him. Occasionally, petitioner would relay his instructions to McDonald through Lindsay.

In making payments to Lindsay, McDonald would customarily use checks previously signed in blank by Brewster, each of which would then be countersigned by petitioner as president. On occasions when McDonald did not have sufficient Association checks to make payments to Lindsay, or the Association's bank account was too low to cover such checks, he informed petitioner of the situation and petitioner instructed him to write the checks on the Western Conference bank account or to borrow the necessary funds from the Western Conference. (Tr. 4409-4410, 4449-4459, 4538-4546, 4554-4555, 4579-4582, 5570-5571, 5577, 5601, 5637.)

McDonald did not know, at the time he entered the checks to Lindsay as being for union construction, that a substantial number of those payments were in fact for petitioner's personal benefit. Since he knew that Lindsay was the union's general contractor, McDonald assumed that the checks were in payment of current or completed union construction work and entered them as such in the union records and on the Form 990 returns. At no time did petitioner

advise McDonald, or lead him to believe, that payments to Lindsay were for anything but union construction. (Tr. 4346-4361, 4380, 4409-4418, 4449-4461, 4564-4565, 4778-4800, 4876-4877, 5208-5291, 5305-5318, 5348-5351, 5460-5466, 5475, 5698-5702.)

Petitioner exercised direct supervision over the Association's bank account. (Tr. 4406.) McDonald prepared monthly financial statements for petitioner showing the Association's opening and closing bank balances, total receipts and disbursements during the month, and a list of receivables and payables (including outstanding checks) as of the end of the month. (Tr. 4460-4463, 4483; Exs. 804, 804-A, 804-B, 804-C.) Exhibit 805 is a worksheet showing receipts and disbursements of Joint Counsel =28 for the period May 1, 1950 to October, 1951. It bears pencil notations in petitioner's handwriting.

McDonald delivered to petitioner's office for signature the original and carbon copies of the 1951 Form 990 returns for both the Association and the Western Conference Pension Trust Fund. He departed from the usual practice of submitting the Association's return to Brewster because the payments by the Association to Lindsay during 1951 had been higher than for the previous year, the instructions for such payments had come from petitioner, and McDonald was uncertain whether he had correctly recorded them. The return for the Pension Trust (Ex. 55) was signed by petitioner on May 15, 1952, and was thereafter filed with the district director, but the return for the Association was never filed. McDonald did not see that return again, and never received

back from petitioner the office copy of the return. (Tr. 341-345, 4575.)

ARGUMENT

A. There is no sound basis for challenging the district court's considered exercise of its discretion in disposing of petitioner's various motions based upon claim of prejudice. The nub of petitioner's argument is that there was strong community prejudice against him created by adverse publicity, that the grand and petit juries were composed of persons who "must necessarily have been biased" and that there was an added element of unfairness because many of the attacks upon him stemmed, directly or indirectly, from an activity of the United States, *i.e.*, the investigations of the Senate Committee. Adverse publicity, whatever its source, does not confer an immunity from prosecution for crime. If the rule were otherwise, the final say as to prosecution might be with the news media rather than with those charged with the responsibility for law enforcement. A person suspected of crime is entitled to a fair trial before an impartial jury of his peers. The trial court took every proper precaution to assure petitioner a fair trial. No more was required.

1. The trial court first took steps to eliminate the danger of prejudice by granting every request for a continuance. We fully accept the proposition, stated in *Delaney* v. *United States*, 199 F 2d 107 (C.A. 1), that it may be necessary to postpone a trial until the danger of "prejudice may reasonably be thought to have been substantially removed." The trial court

scrupulously followed this precept by granting three successive continuances which effectively postponed the trial date to 18 months after the first indictment, 15 months after the second indictment, and 9 months after petitioner's sentencing on the state embezzlement charge. By November 10, 1958, when the trial in fact commenced, the adverse publicity directly involving petitioner had abated, and the proceedings on impanelment of the jury (which, the court of appeals observed, were conducted by the trial judge "in an able and admirable fashion" (Pet. App. "B" 8B)) served further to assure that petitioner would receive a fair trial by an impartial jury. Indeed, by August 1958, three months prior to the trial, the state of the matter was such that petitioner's counsel felt secure in advising the court (R. 310) that "I don't think I would be in any position to ask for any longer continuance [than until] after [the] election" in November. Moreover, the motion for change of venue made at that time was expressly grounded upon reasons of convenience, rather than possible prejudice resulting from continuing publicity. In the circumstances, there is no basis for concluding that the trial judge abused his discretion in denying petitioner's motions for a further continuance or change of venue. Compare *Stroble* v. *California*, 343 U.S. 181, 193 and *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 with *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1) on which petitioner relies. (Pet. 23-24.)

2. The trial court also took every proper precaution during the impanelment of the jury and, again, in instructing the jurors during the trial. Seventeen

prospective jurors were excused because of possible bias or prejudice against petitioners. Ten more were excused because they had viewed telecasts or the Senate Committee hearings. Only one challenge for cause was denied—a juror who had read some newspaper accounts of the Committee hearings. The prospective jurors were carefully questioned about all these matters. All of the jurors selected repeatedly affirmed, by answer to the court's questions and on their oaths, that they could try the case solely on the evidence and instructions by the court. Before every recess of the trial the jury was admonished not to discuss the case with anyone or listen to any telecasts or broadcasts or read any news accounts concerning it. At the conclusion the jurors were emphatically told to avoid all sympathy, bias or prejudice, and decide the case solely on the evidence and applicable law. (See Statement pp. 11-12 *supra*).

3. Petitioner's challenge to the grand jury is without merit. We are aware of no authority, and petitioner cites none, to support the proposition that an indictment is open to attack on the ground that the grand jurors were exposed to a flow of publicity unfavorable to the defendant. Such a proposition runs counter to the principle, firmly embedded in history, that the grand jury, as an investigatory and accusatory body, must have the widest scope. *Costello* v. *United States*, 350 U.S. 359, 362; *United States* v. *Johnson*, 319 U.S. 503, 510; *In re April 1956 Term Grand Jury*, 239 F. 2d 263, 268 (C.A. 7th); *United States* v. *Knowles*, 147 F. Supp. 19 (D.C. D.C.), *United States* v. *Smyth*, 104 F. Supp. 283 (N.D. Cal.); *In re Kittle*,

180 Fed. 946, 947 (S.D. N.Y.). The case of *United States* v. *Nunan*, 236 F. 2d 576, 592-593 (C.A. 2d), certiorari denied, 353 U.S. 912, provides explicit support for the trial court's refusal to quash the indictments on grounds of prejudicial publicity, as does the "general rule" stated in 4 Wharton's *Criminal Procedure*, § 1692, p. 434 (1957) that "bias or prejudice on the part of one summoned as a grand juror * * * does not disqualify him from serving on the grand jury or render invalid indictments returned by it." To similar effect, see *United States* v. *Rintelen*, 235 Fed. 787, 789 (S.D. N.Y.). To apply to grand jury proceedings the prophylactic rules which have evolved in the context of trial on the merits would, we submit, seriously impair and disrupt the administration of criminal law.

The cases relied on by petitioner (Pet. 19-23) are clearly distinguishable in that they concern judicial enforcement of recognized constitutional guaranties—viz., the right to trial by an unbiased petit jury (*Irvin* v. *Dowd*, 366 U.S. 717; *Marshall* v. *United States*, 360 U.S. 310; *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1)) and the bar against discriminatory action by a State in systematically excluding a particular class of citizens from grand jury service (*Hernandez* v. *Texas*, 347 U.S. 475; *Cassell* v. *Texas*, 339 U.S. 282; *Pierre* v. *Louisiana*, 306 U.S. 354).[4] None

[4] There is no claim in this case, nor does there exist any basis for claiming, that petitioner was in any way discriminated against or denied the equal protection of the laws in the impanelment or proceedings of the federal grand jury. Cf. the dissenting opinion of Mr. Justice Black in *Beck* v. *Washington*, No. 40, this Term, May 14, 1962.

of the cases cited establish a right to a grand jury free from possible influence by unfavorable publicity.

We point out additionally, as the court of appeals observed (Pet. App. "B" 7B) that "there was no evidence that in fact the grand jury was prejudiced or that any member thereof had been affected by the vast amount of publicity accorded Beck." Indeed, petitioner makes no claim of personal bias or malice on the part of any grand juror (c.f., *Castle* v. *United States*, 238 F. 2d 131, 135 (C.A. 8th)), and the trial judge specifically ruled, after an *in camera* examination of the grand jury minutes, that no irregularity or other basis appeared in the proceedings to warrant dismissal of the indictments.

B. Petitioner, in challenging the evidence supporting his conviction on the 990 counts, rests heavily upon the point that he did not sign the returns and asserts that the government only showed "a possible motive and opportunity." The charge, of course, is not that petitioner signed the false returns, but that he knowingly caused the fraudulent filings by means of the control and direction which he exercised over his aides. The evidence, we submit, fully warranted the jury in drawing this inference.

Petitioner had first-hand knowledge of Association's obligation to file annual information returns. All checks written to Lindsay were issued on petitioner's instructions and signed by him. These payments were entered on the Association's books and on the returns as legitimate union expenses, when in fact a substantial portion thereof was applied by petitioner to his own benefit. Petitioner concealed the

true purpose of these expenditures from the Association's bookkeepers who, in the absence of contrary information, assumed that the payments were for work done by Lindsay for the union. It also appears that petitioner, although he was undoubtedly a busy man, was not too busy to supervise the detailed financial operations of the Association, particularly as they affected the augmentation of his personal fortune. The evidence fully justifies the conclusion that petitioner not only wilfully participated in, but indeed was exclusively responsible for, the preparation of false 990 returns for the Association in 1950 and 1952. For a similar case under Section 3793(b)(1), sustaining the conviction of a corporate officer who, through his instructions to the bookkeepers, knowingly caused them to make improper entries on the books, resulting in false corporate income tax returns, see *United States* v. *Brill*, 270 F. 2d 525 (C.A. 3d).

The substantial evidence of guilt reviewed above, coupled with the repeated efforts of both counsel and court to assure separate consideration of the evidence bearing on each count and each group of offenses, fully answers petitioner's assertion (Pet. 28) that he was prejudiced by the jury's simultaneous consideration of the 990 counts and the evasion counts.[5] "Unless

[5] It is obviously no defense to a prosecution under Section 3793(b)(1) for assisting in the preparation of false returns on behalf of a tax exempt organization to show that the accused could not have intended to evade his personal income taxes under Section 145(b) with respect to the amounts misrepresented. Hence, the decision in *James* v. *United States*, 366 U.S. 213, has no legal effect as regards petitioner's criminal liability on the 990 counts.

we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice." *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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